Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1565

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

STATE OF LOUISIANA
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

PETITIONER

VERSUS

ANTHONY R. WIEDEMAN, JR.

RESPONDENT

DERYL A. FALCON

RESPONDENT

ROGER AND MONA CONNER [SIC]
DIXIE ELECTRIC MEMBERSHIP CORPORATION
MARK A. COSTON
ALLSTATE INSURANCE COMPANY
CANANDAIGUA WINE COOLER COMPANY, INC. [SIC]

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

The decision below is interlocutory. It does not seriously erode federal policy, and Petitioner has not shown that it should be treated as a final judgment.

The factual record is incomplete since Petitioner's witness was not examined in depth concerning all of the record keeping requirements of 23 U.S.C. § 152, nor at all about 23 U.S.C. §§ 130 and 144. Also, Petitioner's factual assertion that it has no other reason to receive information save the requirements of Title 23 is beyond the scope of the decision below and not of record.

The conflicting decisions cited by Petitioner are distinguishable on the law as arising out of railway-highway crossing accidents whose relevant record keeping requirements arise in part out of 23 U.S.C. § 130 not 23 U.S.C. § 152 as does the decision herein.

The issues presented are not fully developed in the case law. With only two Federal Appellate Circuits contributing decisions and only three state courts of highest appeal contributing decisions, Petitioner has not shown that the issues are adequately developed for decision by certiorari.

The decision below is correct. The Louisiana Supreme Court finds that 23 U.S.C. § 409 preempts state law. It recognizes that Section 409 creates a privilege, and rules that certain of Petitioner's records compiled pursuant to 23 U.S.C. § 152 are not subject to discovery and are inadmissible. The decision acknowledges as correct that the universally accepted reason for enacting Section 409 was to facilitate candor. This federal policy is faithfully enforced by this decision.

The decision as to what is included/excluded from Section

409's protective field is multi-faceted. This decision recognizes the steps in the analysis and reaches a just conclusion for the documents under consideration herein.

Petitioner does not show that the decision is flawed, or that it substantively thwarts the federal government's policy of facilitating candor.

REASONS FOR DENYING CERTIORARI

THE DECISION BELOW IS INTERLOCUTORY

The decision of the Louisiana Supreme Court, sub judice, relates to discovery issues: written interrogatories and request for production of documents, and was interlocutory[1]. This decision has yet to be applied by the trial court herein to determine admissibility of evidence at trial on the merits, and there have been no reported appellate court cases applying this decision of the Louisiana Supreme Court. Although the Louisiana Supreme Court's analysis is thorough, the Louisiana Supreme Court, in fact, was called upon by the record only to discuss a few specific pieces of written evidence such as uniform motor vehicle accident reports and daily traffic counts. Petitioner possesses many types of written information that were not discussed by the Court, and which ultimately may or may not be held to be discoverable/admissible evidence.

THE FACTUAL RECORD IS INCOMPLETE

Petitioner writes that the decision sub judice "is particularly egregious when Louisiana's Department of Transportation and Development has no other reason to receive and compile such

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[1] Denial of certiorari will not seriously erode federal policy. infra. The decision, sub judice, does not appear to meet the criteria set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-503, for reviewing interlocutory rulings.

information other than for the purposes of compliance with Title 23." Only Sections 152, 144 and 130 are relevant to the record keeping inquiry, not the entirety of Title 23.

Evidence was received by the trial court herein at the hearing to compel production of evidence. The witness produced by Petitioner was examined about the purposes of receiving certain types of information; however, there are many types of information which were not discussed. In particular, no mention was made in this record of information gathered pursuant to 23 U.S.C. §§ 130 and 144.

Petitioner's statement that the ruling sub judice is particularly egregious when there is no other reason to receive the information outside of compliance with Title 23 is not well explored in the record, and is a misstatement of the principal inquiry. infra.

THE CONFLICTING DECISIONS ARE DISTINGUISHABLE ON THE LAW

Petitioner complains that the interpretation of 23 U.S.C. § 409 has not been uniform, and cites the needs of railroads for uniformity; however, the case sub judice does not involve a railway-highway crossing claim, nor documents generated pursuant to 23 U.S.C. § 130.

The decisions cited by Petitioner, except Perkins v. Ohio Department of Transportation, 584 N.E.2d 794 (Oh. App. 10th Dist. 1989), deal exclusively with the application of 23 U.S.C. Section 409 to Section 130, railway-highway crossings; however, the Louisiana Supreme Court decision, sub judice, is a Section 152 highway hazard case.

The documents generated for these three different Sections of Title 23 vary with the record keeping requirements in each of the three sections.

Based upon Petitioner's cited cases and its argument, a railway-

highway case appears to be a better vehicle for interpretation of Section 409 than an automobile case such as presented herein.

THE ISSUES PRESENTED ARE NOT FULLY DEVELOPED

Since its enactment and subsequent amendment 23 U.S.C. § 409 has been subject to review by the highest court in only three (3) states and in only two (2) United States Circuit Courts of Appeal. In one decision cited by Petitioner, Southern Pacific Transportation Company v. Yarnell, 176 Az.552, 863, P.2d 271 (Ariz. App. Div. 1 1993), the Arizona Supreme Court has granted review.

Furthermore, even the cases which endeavor to articulate the proper analysis for determining whether a document is covered by Section 409 inevitably leave something out[2].

THE DECISION BELOW IS CORRECT

Section 409 protects information of an enumerated type:

1) Reports, surveys, schedules, lists and data compiled;

for either of two enumerated purposes:

A) Identifying, evaluating or planning the safety enhancement of potential accident sites or railway-highway crossings pursuant to Section 152, 144 or 130; or

B) Developing any highway safety construction improvement project which may be implemented using Federal-aid highway

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[2]In Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp 50, 54 (D.Kan. 1990), the court omitted a step in the analysis, the requirement that the compilation "mention or address" the accident location sued upon.

funds;

and under the overall condition that:

2) The enumerated reports, surveys, schedules, lists or data must mention or address the accident location sued upon.

Purpose (B) from the outline above lists one of the purposes for which the enumerated documents are compiled, and is, in part, determinative of whether a report, etc., is protected by Section 409. It requires that the report, etc., be for developing any highway safety construction improvement project eligible for federal highway funds.

Petitioner engages in many types of construction projects which are not, per se, safety improvements such as maintenance, relocations and rehabilitations, etc. Information such as average daily traffic counts is certainly used to project when a highway will need maintenance, relocation, etc., and is not necessarily exclusively used for safety improvements, although that may be one of its uses. A uniform motor vehicle accident report in Louisiana contains, inter alia, information on damage to Petitioner's property arising from the accident, defects in roadway conditions or controls and other types of information which are used by Petitioner for maintenance, rehabilitations, etc., and not exclusively for safety improvements.

The question naturally arises whether information which is compiled for a purpose listed in Section 409 and for unlisted purpose(s) is or is not protected by Section 409.

Purpose (B) from the outline above shows that this alternative purpose does not incorporate any of the activities found in the first purpose outlined in Purpose (A) above.

Purpose (A) in the outline calls for identifying, evaluating or planning a safety enhancement pursuant to one of three Sections of Title 23; however, purpose (B) lists only one: developing any safety

construction improvement project eligible for federal funds.

Image how the meaning would change if Purpose (B) incorporated the activities of Purpose (A). The new purpose would read as follows:

> (B) **Identifying, evaluating or planning** any highway safety enhancement of potential accident sites....

Congress has expressed clearly its intent to list alternate purposes, each with its own range of covered activities. Purpose (B) seems to be a backstop, or a sort of safety net for the main and first listed purpose.

Purpose (A) is very specific as to which documents are included referring to specific Sections of Title 23 for their meaning; however, the range of activities is broader, including "identifying, evaluating or planning" safety enhancements. Purpose (B) does not refer to Sections 152, 130 or 144; however, it requires that the documents be compiled to develop a project. Purpose (B) is very narrow since it requires the existence of such a project. "Develop a project" surely means making manifest a plan of action.

Turning to the question of exclusivity, Congress did not intend to protect reports, surveys, schedules, lists or data which are compiled for non-listed purposes.

> "One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say." "But, as we have said the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops." (citations

omitted)[3]

One way that Congress could have expressed an intent to protect reports, etc. compiled for any purpose including a listed purpose is for Congress to have said that these are non-exclusive purposes.

Congress could have said, reports, surveys, schedules, lists or data compiled for the purpose of (A) or (B) regardless of any other purpose or use are protected, but it did not. Congress has stopped well short of saying such. (Congress said that the protected writings could not be discovered or admitted into evidence or used for any other purpose, which could include impeachment, rebuttal, etc.)

In further analysis of purpose (A), the terms used in Section 409 "report, survey, schedule, lists and data" are repeated throughout the record keeping requirements of Sections 130, 144 and 152; therefore, Purpose (A) refers to only those enumerated and identified reports, surveys etc. "provided" for in Sections 130, 144 and 152.

The trial court's analysis of Section 409 in Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp. 50, 54 (D. Kan. 1990) is close to being a correct analysis, supra, and we find this outline therein:

> "For purposes of defendant's motion, Section 409 makes inadmissible: (1) reports, surveys, schedules, lists or data, (2) compiled for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites or railway-highway crossings, (3) pursuant to Section 130 of Title 23 (providing, among other things, for state surveys of railway-highway crossings and federal funding for protective devices) or (4) for the purpose of developing any highway safety construction

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[3] 47 Columbia L.Rev. 527, 536.

improvement project which may be implemented using Federal-aid highway funds. (emphasis supplied)

Emphasis is given to the above quoted parenthetical matter because this case recognizes that Congress intended a multi-step analysis before including a document within the protective field of Section 409. If a report, survey, schedule, list or data is compiled pursuant to Section 130, one need look at Section 130 for understanding of the record keeping requirements of that Section and to determine whether the report, etc. was generated "pursuant" to that Section. By themselves the words reports, surveys, schedules, lists and data have no meaning save in the context of the multi-step analysis set forth by Congress in Section 409. Since Section 130 requires states to survey railway-highway crossings, then any survey which mentions or addresses the accident location sued upon and is compiled for the purposes listed is within the protective field of Section 409.

Congress requires that the reports, surveys, schedules, lists and data "be complied for the purpose of", and thereafter listed only three Sections of Title 23. Clearly omitted by Congress are the regulations promulgated under Title 23 along with any other Section in Title 23 including all of Chapter 4.

Had Congress intended to include the regulations promulgated under Sections 130, 144 and 152 in its protective field then it would have indicated such an intention by employing language such as **"and the regulations promulgated thereunder"**. Absent such language these regulations can not be included in the reach of Section 409.

The phrase "compiled for the purpose of" also modifies "highway safety construction improvement project", which is also self-limiting and does not, therefore, include other types of construction projects such as relocations, rehabilitations, maintenance, etc. Unless the writing was generated exclusively for the purpose of developing such a safety improvement project, then Section 409 does not apply. supra.

Petitioner's witness testified that there was no current project or plan to improve the intersection where this accident occurred; therefore, Petitioner could not have generated any of the requested documents for the purpose of "developing" a safety improvement project.

The final modifying phrase of Section 409 requires that the enumerated document mention or address the accident location. Any writing which may be otherwise appropriate for protection pursuant to Section 409 and which does not mention or address the location of the accident sued upon, does not qualify for protection under Section 409. The final sentence of Section 409 requires that a report, survey, schedule, list or data mention or address the accident location as a condition of inclusion into the protective field of Section 409. This final condition of Section 409 assumes the existence of an assemblage of information in order for there to be an address or mention of an accident location. This final condition further negates Petitioner's argument for an expansive reading of the term data. This final condition assumes that any compiled data will address or mention a specific accident location in a self-critical way. If the self-critical analysis is part of the record keeping requirements of Sections 152, 144 or 130, then the document is protected. If the document is compiled for developing a safety improvement construction project utilizing federal funds then it is also protected.

The statute makes no mention whatsoever of deposition or trial testimony of the authors of protected writings. Cited cases to the contrary aside, one does not "duck", infra. Section 409 by permitting discovery depositions and trial testimony of persons who can be examined outside the use of protected documents.

Petitioner's cited cases lack any analysis of why or how Congress could have intended to limit the testimony of experts. This erroneous holding is merely another step in the faulty analysis leading to the erroneous conclusion that Congress intended to exclude documents compiled for an enumerated purpose regardless whether or not the documents were also compiled for an unlisted purpose.

Both are erroneous holdings arising from reading too much into Section 409. Section 409 does not exclude expert testimony and it does not exclude information compiled for unlisted purposes, even if it is also compiled for a listed purpose.

Petitioner argues on page nine (9) that the Louisiana Supreme Court "eviscerated" the privilege created by Section 409; however, the Louisiana Supreme Court reversed a prior Louisiana case, Martinolich v. Southern Pacific Transportation, 532 So.2d 435 (La. App. 1st Cir. 1988); writ denied, 535 So.2d 745 (1988), (U.S. Cert. denied, June 12, 1989, 88-1856) which had held that Section 409 did not create a privilege, and now it holds that Section 409 does create a privilege.

The decisions cited by Petitioner, including the decision, sub judice, uniformly hold that Section 409 preempts state procedural laws in conflict therewith.

Petitioner writes at page seven (7) that Section 409 "has a significant impact on civil litigation in state as well as federal tribunals". For the most part, however, the substantive law to be applied in the civil litigation referred to by Petitioner is state substantive law whether it is applied by a state court or a federal court applying state law under the Erie Doctrine.

Petitioner writes at page ten (10), that the decision sub judice "completely thwarts the intent of Section 409 in particular and, to a great degree, the purposes of Title 23 in its entirety."

Petitioner fails to provide an analysis of the intent of Congress in enacting Section 409 other than illustrating the minor variations in interpretation under Section 130 railway-highway crossing cases. Since the case, sub judice, is a Section 152 case, Petitioner's factual illustrations are not wholly applicable.

Petitioner quotes at length from and relies on Southern Pacific Transportation Company v. Yarnell, 176 Az. 552, 863 P. 2d 271 (Ariz. App. Div. 1 1993), which is a decision of an intermediate appellate

court, but fails to advise this Honorable Court that the Supreme Court of Arizona has granted review. Oral argument is set therein for May 5, 1994.

Ultimately, Petitioner does not show that the decision of the Louisiana Supreme Court "completely thwarts the intent" of Congress in enacting Section 409; likewise, Petitioner is unable to show that the "Louisiana Court effectively eviscerates Section 409".

Section 409 has an aim, as does every statute.

> "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose."[4]

Petitioner's cited cases state that Section 409 was enacted to facilitate candor. Harrison v. Burlington Northern Railroad Company, 965 F.2d 155, 156 (7th Cir. 1992), Robertson v. Union Pacific Railroad Company, 954 F.2d 1933 (8th Cir. 1992), Southern Pacific Transportation Company v. Yarnell, 863 P.2d 271, 274 (Ariz. App.Div. 1 1993) (Review granted).

These cases also say that the Congressional language is broad. The lower court in Harrison is quoted as saying that it could not "duck the statute" by permitting cross examination of the author of an excluded report because his testimony would have "circumvented the purposes of the statute". Harrison p. 160.

In contrast to the decisions cited by Petitioner the trial court in Light v. State, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990) writes,

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[4] 47 Columbia L.Rev. 527, 539(1947).

> "the goal of assuring candor is not necessarily synonymous with an intent to deprive the plaintiffs' bar of all access to relevant highway safety information. * * * it does not, expressly or by implication, make the information contained in such reports confidential."

Candor as a motivation in creating a privilege is discussed in the field of Self-Critical Opinions, which is a privilege applied in Federal Courts in certain limited circumstances.

Claims of privilege of Self-Critical Opinions in Federal Courts meet the following analysis:

1. information sought must result from critical self-analysis undertaken by the party seeking protection;

2. strong public interest must exist favoring the free flow of the type of information sought;

3. information sought must be of the type, release of which, would chill other disclosures[5].

In the application of this privilege clear distinction is drawn between subjective and objective information,

> "Courts have seemed to assume that all factual portions of self-analyses fall outside the privileges's rationale[6].

All statements of fact are discoverable, only evaluative or subjective impressions are protected, and if the information is mixed,

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[5]96 Harv.L.Rev. 1083, 1090 (1983).

[6]Ibid, p. 1094.

then in camera inspections are employed to edit the material[7].

Also, non-documentary discovery is permitted, such as deposition discovery of the person making the protected report[8].

There is also provision for exceptional need, which is a "standard doctrine surrounding the privilege of self-critical analysis".[9]

Consistent with the conclusion reached by the court in Light, supra that candor is not synonymous with an intent to deprive the plaintiffs' bar of access to probative information, the privilege of Self-Critical Opinion, which is a candor privilege,[10] does not deprive litigants of underlying facts or testamentary evidence. It does not seem necessary or desirable to read § 409 in a way that deprives litigants of more than those documents clearly set forth by Congress, and under the conditions clearly set forth for each document. These documents are compiled for the record keeping requirements of Sections 152, 144 and 130, or compiled for developing (implying active consideration) a safety construction improvement project eligible for federal funding.

Petitioner's arguments below sought to imbue Section 409 with the mantle of an immunity statute. Given the absence of Congressional discussion it is highly improbable that Congress intended to provide any

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[7] Ibid.

[8] Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn 1977).

[9] 96 Harv.L.Rev. 1083, 1099 (1983).

[10] Some students of this "privilege" describe it as "akin to the work-product rule" which is a qualified immunity not a privilege. 51 George Washington L.Rev. 551, 573, 575.

tort protection to Petitioner by enactment of Section 409.[11]

Section 409 is a foil created by Congress not to disarm claimants, but to right some perceived disadvantage created by the record keeping requirements of Sections 152, 144 and 130. The record keeping requirements of Sections 152, 144 and 130 can not be divorced from the meaning of "reports, schedules, surveys, lists and data" of Section 409.

Petitioner is clearly wrong to aggregate Section 409 with all of Title 23 when it writes that the decision herein "completely thwarts the intent of Section 409 in particular, and to a great degree, the purposes of Title 23 in its entirety". Section 409 does not embrace all of Title 23. The aim and policy of Section 409 is vastly different from the aim and policy of Title 23.

Congress has spoken with precision in explaining what it intends to withhold. Congress would not use a meat cleaver to accomplish that which could be done with a scalpel. The decision herein acknowledges the generally recognized Congressional motive for enacting Section 409, and as Congress intended, withholds from claimants that which is clearly identified by Congress to be necessary to correct the perceived disadvantage created by Congress' record keeping requirements of Sections 130, 144 and 152.

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[11] "In a brief filed in Lafayette state district court, Asst. Atty. Gen. Carey Raughman Holliday warns that counsel for the DOTD "is recommending that the department refuse to accept the $3.5 million in federal funds and to shut down the railroad crossing upgrade program." * * * Holliday said in an interview that turning down the railroad improvement money is only under discussion. But he said consideration of shutting down the program and wiping out the computer data base is a possibility. * * *" **It would be cheaper to let people die than upgrade the system**," Holliday remarked.'" Sunday Advocate, Baton Rouge, La., April 24, 1994. (Emphasis added)

It seems fair, as the Louisiana Supreme Court did, to take into consideration the traditional function of pre-trial discovery and access to courts normally given tort claimants when undertaking an analysis of this statute.

> "The meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."[12]

Had Congress intended a broad meaning for the terms report, survey, schedule, list and data, there is every reason to believe it simply could have used broad language such as "any and all documents or writings". Furthermore, an expansive reading of these terms serves to fulfill Petitioner's expectations as argued above that Section 409 is a tort reform measure, despite the complete absence of discussion in any reported decision that tort reform was a possible intent.

With the modifiers and limiters Congress designed into Section 409 it is difficult to conceive of this statute as "broadly" written, or severely restricting access to information.

The decision by the Louisiana Supreme Court is correct and it contains a fair and faithful analysis of the intention of Congress in enacting Section 409. The decision, sub judice, does no violence whatso-ever to 23 U.S.C. § 409. The different results cited by Petitioner, in part, may be attributed to differences in the types of cases and types of documents under decision. The decision herein fairly interprets and applies Section 409 in a highway hazard setting. Any differences between the treatment below and other decisions cited by Petitioner are not substantial enough to warrant review and a decision by this Honorable Court.

CONCLUSION

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[12] 47 Columbia L.Rev. 527, 538 (1947).

The Louisiana Supreme Court has upheld 23 U.S.C. § 409; has held that it preempts state law; and has held, within the confines of this controversy, that certain documents are privileged from discovery and use in Court.

Petitioner greatly exaggerates the perceived harm caused by Louisiana's interpretation of this statute.

Petitioner has not shown that the minor variations found in the few decisions interpreting this statute raise a substantial federal question.

The federal policy involved is found in Section 409, not the entirety of Tittle 23 as argued by Petitioner.

Section 409's policy is to facilitate candor. This is a much narrower and very different policy from that of Title 23. The Louisiana Supreme Court's decision clearly upholds this policy of encouraging candor. Petitioner is unable to show and did not show that the decision seriously erodes the generally recognized policy of encouraging candor. Since the decision is interlocutory, Petitioner has not shown that the decision is reviewable.

The decisions, save one, relied on by Petitioner are railway-highway crossing cases which involve the record keeping requirements of Section 130 while the case herein involves the record keeping provisions of Section 152, making Petitioner's legal arguments distinguishable from the legal issues herein.

In addition, very few decisions have interpreted Section 409 and Petitioner has not shown that there has been sufficient analysis of this statute to justify decision by certiorari.

And, finally, the decision by the Louisiana Supreme Court is correct.

Petitioner's requested relief should be denied.

Respectfully submitted,

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